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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER WANHAINEN,

Defendant and Appellant.

B172381

(Los Angeles County
Super. Ct. No. KA062875)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Affirmed.

Jonathan B. Steiner, Executive Director, and Ronnie Duberstein, California
Appellate Project, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, and

Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for
Plaintiff and Respondent.

INTRODUCTION

Defendant Christopher Wanhainen appeals from a judgment of conviction, contending that the trial court erred in denying his request for a continuance so he could be represented by retained counsel at sentencing. We find no abuse of discretion and affirm the judgment.

PROCEDURAL BACKGROUND

In an information filed by the District Attorney of Los Angeles County, appellant was charged with two counts of inflicting corporal injury on a cohabitant or former cohabitant. (Pen. Code, § 273.5, subd. (a).) It was also alleged that appellant previously suffered a conviction for a serious or violent felony, within the meaning of section 667, subdivision (a), and within the meaning of the “Three Strikes” Law (§§ 667, subds. (b)-(i), and 1170.12, subds. (a)-(d)), for which he had served a prison term, within the meaning of section 667.5, subdivision (b). The prosecution’s subsequent motion to strike the allegation pursuant to section 667, subdivision (a) was granted.

Appellant filed a *Marsden* motion, which was denied after hearing.¹

A jury found appellant guilty of one count of inflicting corporal injury on a cohabitant or former cohabitant (count one), and acquitted him of the second count. Appellant waived jury trial on the prior allegations and admitted he had

¹ Appellant does not rely on the denial of his motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 as being relevant on appeal.

been convicted of a strike offense and served a prison term pursuant to section 667.5, subdivision (b).

The court declined defense counsel's request to strike the prior or reduce the current offense to a misdemeanor. The court also denied appellant's motion to continue sentencing to allow appellant to substitute in private defense counsel and file a motion for a new trial.

The court denied probation, and imposed a sentence of six years in state prison, consisting of the middle term of three years for the underlying offense, which was doubled due to the strike prior. The court struck a one-year term for the prison prior, for sentencing purposes only. The court ordered appellant to pay a restitution fine of \$1,200 and imposed and stayed a parole revocation fine in the same amount.

This timely appeal followed.

FACTUAL BACKGROUND

Appellant was driving with his girlfriend, Veronica Lopez, when he became angry and began to curse at her. He punched her on the side of her head, causing her head to strike the passenger window of the van with enough force that she suffered two "big gashes" on her head and a bruise on her cheek. He also spat on her. After he stopped the van in front of her sister's apartment building, he continued striking her and also bit her on the arm. Lopez's nephew was nearby and saw appellant hit Lopez in the face and saw that she was bleeding. Appellant tried to force Lopez out of the van, but she did not want her family to see her in that condition. They drove to appellant's stepfather's house, where Lopez cleaned up and asked appellant's mother to drive her back to her sister's apartment; she did so.

Appellant's son, who was sitting in the back seat of the van during the incident, testified that he saw Lopez punch appellant in the eye, but did not see his father hit Lopez. He did see his father try to push Lopez out of the van. He did not notice the bruises on Lopez that were shown in the People's exhibits.

Appellant's mother testified that she noticed Lopez was upset when they arrived. Lopez did not tell her that appellant hit or bit her. She did not notice the injuries on Lopez that were shown in the People's exhibits.

DISCUSSION

Appellant contends that the trial court erred in denying his request for a continuance of 35 to 45 days, made after the trial court denied appellant's motions to reduce the offense to a misdemeanor and strike a strike prior for sentencing purposes. Defense counsel, Dana Flaum, informed the court that appellant wished to address the court, and the court allowed him to proceed.

Appellant stated: "I'd like to postpone my sentencing for 45 days because I got a new attorney and his name is Angelo Ervin. I want to file a motion for a new trial based on the sufficiency of bad counsel, bad faith of practice, and just basically to make sure that -- it's a lot of legal language I don't really understand. I need somebody I could trust to fill my shoes. I'd like 35, 45 days continuance on my sentencing." The court asked when he hired Ervin, and appellant replied, "Last week." The court: "And do you have any idea why he isn't here today?" Appellant: "He's on another case." The court: "Madame Clerk, have you been contacted by any new lawyers?" The clerk: "No." The court: "Well, the matter is here for probation and sentencing today. The matter was concluded on December the 12th, the better part of 30 days, to contact this individual and have him appear. Mr. Flaum, any comments that you care to make at this point relating to the

lawyer?” Mr. Flaum: “I was going to tell the court I have not been contacted by anybody. I spoke to Mr. Wanhainen yesterday and I was not aware of any attorneys coming in on the case, so it’s news to me at this stage.” The court: “Mr. Serna, any comments?” Mr. Serna (the prosecutor): “I think under the circumstances, I think it’s appropriate to proceed with the sentencing.” The court: “Yes. I do too at this point. Things might be a little different if Mr. Ervin had appeared or he contacted the court even or if we’d been notified in some fashion of this development. It does appear that it’s just a matter of stalling for time.” The court then proceeded with conducting the sentencing hearing.

The trial court’s refusal to grant a motion for a continuance is reviewed for abuse of discretion, and will not be disturbed on appeal absent a showing the trial court acted arbitrarily or exceeded the bounds of reason, all circumstances being considered. (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 263-264.)

Continuances will be granted only upon a showing of good cause; a significant factor to consider is whether granting the continuance would be useful. (Pen. Code, § 1050, subd. (e); *People v. Beeler* (1995) 9 Cal.4th 953, 1003-1004.)

The California Supreme Court has held: “The right to the effective assistance of counsel ‘encompasses the right to retain counsel of one’s own choosing. [Citations.]’” (*People v. Courts* (1985) 37 Cal.3d 784, 789, quoting *People v. Holland* (1978) 23 Cal.3d 77, 86, overruled on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7.) “[T]he right [to retain counsel of choice] ‘can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.’ [Citations.]” (*People v. Courts, supra*, 37 Cal.3d at p. 790, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 208.) The Supreme Court has held: “The right to such counsel ‘must be carefully weighed against other values of substantial

importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.’ [Citation.]” (*People v. Courts, supra*, at p. 790, quoting *People v. Byoune* (1966) 65 Cal.2d 345, 346.)

The *Courts* decision concluded a continuance for the purpose of retaining an attorney may be denied if the defendant is “‘unjustifiably dilatory’ in obtaining counsel.” (*People v. Courts, supra*, 37 Cal.3d at pp. 790-791; *People v. Byoune, supra*, 65 Cal.2d at pp. 346-347; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) On review, we look to the circumstances and reasons presented to the trial court at the time the request was denied to determine whether the denial was so arbitrary as to violate due process. (*People v. Courts, supra*, 37 Cal.3d at p. 791; *People v. Jeffers, supra*, 188 Cal.App.3d at p. 850.) The defendant has the burden of demonstrating an abuse of discretion. (*People v. Courts, supra*, 37 Cal.3d at p. 791; *People v. Jeffers, supra*, 188 Cal.App.3d at p. 850; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.)

The only question presented to the trial court here was whether the case should be continued for the purpose of substituting a privately retained attorney; the court did not deny appellant’s motion to substitute a retained attorney. “In answering this crucial question, initially we set out the principles governing the trial court’s power to grant [a] continuance. As has been firmly established, due process of law comprises a right to appear and defend with retained counsel of one’s own choice. [Citations.] However, a defendant who desires to retain his own counsel *is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory* or if he arbitrarily desires to substitute counsel at the time of the trial. [Citations.]” (*Blake, supra*, 105 Cal.App.3d at pp. 623-624; italics added.)

Blake continued, “To put it another way, the right of a defendant to appear and defend with retained counsel of his own choice is not absolute [citation]; ‘it must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.’ [Citation.] It is likewise settled that it is within the sound discretion of the trial court to determine whether a defendant shall be granted a continuance to obtain a private counsel [citation]; that there is no mechanical test for deciding whether a denial of a continuance is so arbitrary as to violate due process but rather each case must be decided on its own facts [citations]; that the burden is on the defendant to establish an abuse of discretion; and that in the absence of showing an abuse, the reviewing court will not disturb the ruling of the trial court. [Citation.]” (*Blake, supra*, 105 Cal.App.3d at p. 624.)

The trial court here was confronted with only a speculative possibility that Ervin would be available to represent defendant. Appellant said he had retained Ervin the prior week. Assuming he had been retained, Ervin had done nothing to inform the court that he intended to take over appellant’s representation. The public defender had met with appellant the day before the sentencing hearing and appellant had said nothing about retaining a new attorney. The trial court justifiably concluded that granting a continuance here would interfere with orderly and expeditious judicial administration, and likely would have been ineffectual since Ervin’s commitment to represent appellant was questionable. (See *People v. Massie* (1967) 66 Cal.2d 899, 910 [denial of continuance on ground that participation by a particular private attorney was still quite speculative at the time the motion for continuance was made]; *People v. Murphy* (1973) 35 Cal.App.3d 905, 915-916 [same].) Under these circumstances, the trial court did not abuse its discretion in denying the continuance motion and proceeding to sentence appellant.

DISPOSITION

The judgment is affirmed.

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CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.